

FEMA , PMLA AND BLACK MONEY ACT

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Foreign Exchange Management Act

Key Provisions

- Section 3 – Prohibition on Dealing in Foreign Exchange , unless otherwise permitted under the Act / Rules / Regulations
 - Deal in or transfer any foreign exchange / security to unauthorised person
 - Make any payment to person resident outside India
 - Receive any payment from outside India except through authorised person
 - Enter into financial transaction in India as consideration for or in connection with acquisition or creation or transfer of a right to acquire, any asset outside India by any person
- Section 4 - Prohibition on holding, acquiring, owning or possessing foreign exchange / security or immovable property outside India , unless otherwise permitted under the Act / Rules / Regulations

Penal Provisions

- Section 13 (1) – Penalty For contravention of provision of Act / Rules / Regulations
 - Up to 3 times the amount, when it is quantifiable
 - Up to Rs. 2 lakh, when it is not quantifiable
 - Further penalty of Rs. 5000 per day, for continuing offence
- Section 13 (1A) - Penalty For Acquiring Foreign Exchange, foreign security or immoveable property outside India over Rs. 1 crore
 - Up to 3 times the sum involved
 - Confiscation of value equivalent in India of assets held in India
- Section 13 (2) – confiscation
 - Of currency, security or money or property in relation to which contravention committed

Prosecution

- Section 13 (1B) – Initiation of Prosecution [Only in a proceeding under Section 13 (1A)]
 - Adjudication Authority may recommend after recording reasons
 - Director of Enforcement on satisfaction may direct for filing of criminal complaint after recording reasons in writing
 - Such complaint to be filed by an officer not below rank of Assistant Director
- Section 13 (1C) – Punishment for contraventions under Section 13 (1A)
 - In addition to penalty, punishment up to 5 years and fine
- Section 13 (1D) – Cognizance of complaint
 - No court shall take cognizance unless written complaint by officer not below rank of Assistant Director

Offences by Companies

- Section 42 (1)
 - Every person who was in charge of, and was responsible to, the company for the conduct of the business of the company at the time of commission of such offence shall be proceeded against and punished accordingly
 - Unless such person proves such contravention took place without his knowledge or that he exercises due diligence to prevent such contravention
- Section 42 (2)
 - If the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of, director, manager, secretary or officer of the company
 - Such director, manager, secretary or officer shall be proceeded against and punished accordingly

Seizure of Equivalent Indian Asset

- Section 37A

- Authorised Officer can seize value equivalent in India of such foreign exchange / security of immovable property held outside India worth more than Rs. 1 crore
- Seizure order to be placed before Competent Authority (as notified) for confirmation
 - Within 30 days from date of seizure
- Confirmation Order to be passed by Competent Authority (as notified) after giving opportunity of being heard
 - within 180 days from date of seizure
- Confirmation order to continue till disposal of adjudication proceeding post which adjudicating authority may pass further order
- If at any stage of proceedings under FEMA, the said contravened amount is brought back to India, the adjudicating authority or competent authority, on application, can set aside seizure

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Prevention of Money Laundering Act

Key Provisions

- What is money laundering?
 - Knowingly conceals, possesses, acquires, uses and projects or claims
 - Proceeds of crime as untainted property
- What are proceeds of crime?
 - Any property derived or obtained as a result of criminal activity related to scheduled offence
 - Property equivalent in value held within the country **or abroad**
 - Even money held outside India legally brought within the ambit of PMLA for the purpose of determining property equivalent

Attachment / Confiscation

- Provisional attachment: section 5 – reason to believe – 180 days
 - 180 days period to exclude period of stay granted by High Court and further period of 30 days post vacation of stay
- Adjudication: section 8 – attachment to continue or not – applicable also to proceedings pending in criminal courts outside India for money laundering [section 60(2)]
 - Property can be attached only for a period of 90 days during investigation
- Confiscation: section 8(5) – after trial
- Bonafide owner of property can apply for release

Prosecution / Arrest...

- Section 4
 - Rigorous Imprisonment not less than 3 years up to 7 years and fine
 - If the underlying scheduled offence is under NDPS Act, then up to 10 years
- Section 19 - Power to Arrest
 - Director, Deputy Director, Assistant Director or other officer may arrest
 - On the basis of material in possession
 - Having reasons to believe
 - Forward copy of arrest order along with material in possession to be forwarded to Adjudicating Authority
 - Within 24 hours to be produced before **Special Court** or JM
 - Time taken to reach such court from place of arrest to be excluded

...Prosecution / Arrest

- Section 45

- All offences under the Act made cognizable and non-bailable
- Person accused either on his own or as co-accused where the amount of alleged money laundering is below Rs. 1 crore
 - Bail to be granted if Special Court directs
- Twin Conditions [held unconstitutional by SC in *Nikesh Tarachand Shah (decided on 23.11.2017)*] – still not amended vide 2018 amendments
 - Opportunity to PP to oppose application for release
 - Court has to be satisfied that there exist reasonable grounds to show that the person is not guilty of the offence or is not likely to commit the offence

- Section 44 – Trial

- Before Special Court along with the Scheduled Offence
- If scheduled offence is already being tried in another court, on application such court can commit case to Special Court

Key 2018 Budget Amendments

- Definition of “proceeds of crime” - S. 2(1)(u)
 - Property equivalent in value held within the country **or abroad**
 - Even money held outside India legally brought within the ambit of PMLA for the purpose of determining property equivalent
- Duration of Attachment – 3rd proviso to Section 5(1)
 - 180 days period to exclude period of stay granted by High Court and further period of 30 days post vacation of stay
- Section 8(3)(a)
 - Property can be attached only for a period of 90 days during investigation

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Black Money Act

Key Provisions

- Scope
 - Undisclosed foreign income and asset held in the previous year
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- Charge – Section 3
 - Tax @ 30% on its value in the previous year
 - Value= fair market value
- Effective date
 - Assessment Year – on or after 1st April, 2016

Penal Provisions...

- Section 41 – Penalty for undisclosed foreign income or asset
 - Up to 3 times the amount of tax demanded under the Act
- Section 42 & 42 – Penalty for failure to furnish returns or filing inaccurate returns
 - Rs. 10 lakh
- Section 44 – penalty for default in payment of tax arrear
 - Equal to tax demanded
- Section 45 – penalty for failing, without any reasonable cause, to answer any question, sign any statement, produce any records as requested in summons under Section 8
 - Rs. 2 lakh

... Penal Provisions

- Section 46 – Procedure
 - Separate Notice (apart from tax demand)
 - Notice to be issued
 - During any proceeding under the Act
 - Within 3 years from the end of the financial year in which default is committed
 - Order of Penalty to be passed after giving an opportunity of being heard
- Section 47 – Bar of Limitation for imposing penalty
 - No order for imposing penalty can be passed after one year from the end of the financial year in which Notice under Section 46 has been issued

Offences and Prosecution...

- Section 48
 - Provision to in addition to and not in derogation of prosecution provisions under any other law
 - Independent of any other order as may or may not be passed under this Act
- Section 49 & 50 – Punishment for failure to furnish returns or filing inaccurate returns
 - Rigorous imprisonment for not less than six months and up to 7 years and fine
- Section 51 (1) – Punishment for wilful attempt to evade tax, interest or penalty imposable under this Act [Resident]
 - Rigorous imprisonment for not less than 3 years and up to 10 years and fine

...Offences and Prosecution

- Section 51 (2) – Punishment for wilful attempt to evade tax, interest or penalty imposable under this Act [Person]
 - Rigorous imprisonment for not less than six months and up to 7 years and fine
- Section 51 (3) – wilful evasion shall include a case where any person
 - Has in his possession or control any books of accounts or other documents containing a false entry or statement
 - Makes or causes to be made any false entry in such books of accounts or other documents
 - Wilfully omits or causes to be omitted any relevant entry or statement in such books of accounts or other documents
 - Causes any other circumstance to exist which have the effect of enabling such a person to evade tax, interest or penalty under the Act

...Offences and Prosecution

- Section 52 – Punishment for false statement in verification
 - Rigorous imprisonment for not less than six months and up to 7 years and fine
- Section 53 – Punishment for abetment
 - Rigorous imprisonment for not less than six months and up to 7 years and fine
- Section 54 – presumption as to culpable mental state
- Section 55 – Sanction for prosecution
 - Must be given either by Principal Commissioner, Commissioner or Commissioner (Appeals), as the case may be

THANK YOU

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